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January 12, 2009

DECISION AND ORDER  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 8, 2008

Case Number: TSO-0682

This Decision concerns the eligibility of XXXXXXXXXXXX (the individual) to hold an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."<sup>1</sup> In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual should be granted an access authorization. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the DOE should not grant the individual an access authorization.

**I. Background**

The individual is a DOE employee. In the course of completing a Questionnaire for National Security Positions (QNSP) in February 2008, the individual indicated that he had been terminated from employment in 2002 following a positive result on a random drug test, and that he was over 90 days delinquent on one specified debt. Exhibit 5 at 31, 37.<sup>2</sup> The local DOE security office (LSO) then conducted Personnel Security Interviews (PSI) in June and August 2008 to inquire more deeply into these matters. Exhibits 3, 4. The PSIs did not resolve the LSO's concerns about the individual's finances and marijuana use, but rather raised additional concerns. The LSO ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and

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<sup>1</sup> Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a).

<sup>2</sup> The individual completed an electronic form of the QNSP, entitled Electronic Questionnaire for Investigations Processing, or e-QIP.

that the doubt could not be resolved in a manner favorable to him. Accordingly, the LSO proceeded to obtain authority to initiate an administrative review proceeding.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization. Specifically, the DOE characterized this information as indicating that the individual had deliberately omitted significant information from his QNSP and falsified information during a PSI; had possessed marijuana; and had engaged in conduct that tended to show that he was not trustworthy or reliable with respect to his finances and his association with users of marijuana. Exhibit 1 (citing 10 C.F.R. § 710.8(f), (k), and (l), respectively).<sup>3</sup>

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the LSO forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter on October 9, 2008.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, his mother, his girlfriend, and a member of his military unit. The DOE Counsel submitted ten exhibits prior to the hearing, and the individual presented three exhibits at the hearing.

## **II. Regulatory Standard**

A hearing under Part 710 is held “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization,” i.e., “to have the substantial doubt regarding eligibility for access authorization resolved.” 10 C.F.R. § 710.21(b)(3), (6). It is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I

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<sup>3</sup> Criterion F relates, in relevant part, to information that a person “[d]eliberately misrepresented, falsified, or omitted significant information from a . . . Questionnaire for Sensitive (or National Security) Positions [or] personnel security interview. . . .” 10 C.F.R. § 710.8(f) (Criterion F).

Criterion K relates, in relevant part, to information that a person “possessed . . . a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana . . . ) except as prescribed or administered by a physician . . . or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8(k) (Criterion K).

Criterion L relates, in relevant part, to information that a person “[e]ngaged in any unusual conduct or is subject to any unusual circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . . .” 10 C.F.R. § 710.8(l) (Criterion L).

am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).<sup>4</sup> After due deliberation, I have determined that the individual should not be granted an access authorization. The specific findings that I make in support of this decision are discussed below.

### **III. The Notification Letter and the Security Concerns at Issue**

In the Notification Letter, the LSO sets forth its concerns regarding the individual's eligibility for access authorization and the facts that support each of those concerns. The LSO cites two distinct bases for its security concerns under Criterion F: the individual's failure to list 13 delinquent accounts, which total about \$27,500, on a QNSP, and contradictory statements the individual made during a PSI conducted on June 24, 2008 (the June PSI) regarding his association with marijuana users. For its security concerns under Criterion K, the LSO again cites two factual bases: his admission during the June PSI that he tested positive for marijuana on a urinalysis conducted in 2002, and his admission during a PSI conducted on August 12, 2008 (the August PSI), that he passed marijuana joints (cigarettes) among relatives a number of times during visits to his uncle's house. Finally, the LSO cites two grounds for its security concerns under Criterion L. The first is that the individual has a number of delinquent accounts but has failed to take action to pay the debts or resolve any disputed claims. The second ground for concern is the individual's admission during the August PSI that he has associated with individuals who smoked marijuana on visits to his uncle's house, the most recent of which was in July 2008.

I find that the information set forth above constitutes derogatory information that raises legitimate questions regarding the individual's eligibility for access authorization under Criteria F, K, and L. Failure or inability to satisfy debts and meet financial obligations may indicate lack of judgment or unwillingness to abide by rules and regulations. Such behavior can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. See Guideline F of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines). Deliberately omitting or concealing relevant facts in a process for determining eligibility for

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<sup>4</sup> Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, including knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

access authorization demonstrates questionable judgment and lack of candor, and can also raise questions about an individual's reliability, trustworthiness and ability to protect classified information. *See* Guideline E of the Adjudicative Guidelines. Association with persons involved in criminal activity, such as using marijuana, raises similar questions. *Id.* Finally, involvement with drugs, including testing positive for illegal drug use and possession of illegal drugs, raises questions about an individual's reliability and trustworthiness, not only because drug use may impair judgment, but also because it may indicate an inability or unwillingness to comply with laws, rules, and regulations. *See* Guideline H of the Adjudicative Guidelines.

#### **IV. Findings of Fact**

The relevant facts in this case are not in dispute. The derogatory information that the LSO cites as supporting evidence for its security concerns under Criteria F, K, and L fall into two factual areas, drug involvement and financial irresponsibility. In this section, I will set forth the evidence regarding each of these factual areas.

##### *Drug Involvement*

The individual testified at the hearing that he last used illegal drugs of any kind in 1982, when he was in high school. Transcript of Hearing (Tr.) at 44. He has been a member of the armed forces since 1987, serving as a military law enforcement officer. *Id.* at 29, 45. A member of his military unit testified that all individuals in their unit have been randomly tested for drugs at least once a year for at least the last ten years. *Id.* at 97-98. The fellow unit member stated that all of the individual's test results since at least 2006 have been negative, because a positive result would have come to his attention; as training manager for the unit, he is informed of any positive drug tests. *Id.* at 91; *see also* Exhibit 3 (Transcript of August 12, 2008 PSI) (August PSI) at 13 (individual stating that his military drug screens have always been negative).

In 2002, however, his civilian employer required him to undergo a random test for drug use by providing a urine sample. August PSI at 6. The results of the urinalysis indicated that the individual tested positive for an illegal drug, possibly marijuana. Exhibit 4 (Transcript of June 24, 2008 PSI) (June PSI) at 77; August PSI at 7. He has consistently maintained that the test must have been inaccurate, because he had not used any illegal drugs since high school. Exhibit 5 at 32 (QNSP); June PSI at 77; August PSI at 9. When his employer confronted him with the positive test result, he was offered a retest of a different portion of the same sample he had provided. Tr. at 41. He rejected this offer, because he was told he would bear the cost of the retest should it produce a second positive result. *Id.*; August PSI at 14-15. He believed at the time, and continued to believe at the hearing, that retesting the same sample would have to yield the same result, and he was not willing to pay for a retest under those conditions. Tr. at 43. He offered to provide a new sample, but the employer rejected that offer. Tr. at 41; August PSI at 14. Consequently, the employer terminated the individual. August PSI at 15. The individual supported his contention that the test was inaccurate with the testimony of his mother, who was employed by the same company at the same time and also tested positive on a drug screen. The

individual's mother testified that in fact she tested positive twice, but maintained her position with the company, through the intervention of her union. Tr. at 108. She also testified that her son was not in a union position. *Id.* Finally, she stated that she was not aware of any other employees receiving false positive drug screens at their employer during the same period. *Id.* at 104.

Until recently, the individual lived in the same city as many of his relatives, including an uncle at whose house family members would often congregate to socialize and play games. Some of those present at his uncle's house, including his uncle and his brother, would smoke marijuana in the individual's presence. August PSI at 18, 20. He would pass the marijuana from one person to another, but never smoke it himself. *Id.* at 21. The individual testified at the hearing that he has since moved to another city several hours away from his family, and now sees his relatives rarely. Tr. at 70, 72. He emphasized that he had not been to his uncle's house for a social occasion for "a long time" before his move as well. *Id.* at 70.

At his June PSI, the individual was questioned twice about his association with individuals who use marijuana. In the Notification Letter, the LSO contends that his responses were contradictory and were evidence that he had deliberately misrepresented or falsified significant information in this proceeding. The first time this matter was raised, the interviewer asked, "Do you currently associate with anybody who uses illegal drugs?" to which the individual responded, "I mean I know people that do, but it's not like I hang out with, if, if associating [means] hang out with people that do drugs, no." June PSI at 70. Later, after questioning the individual about any medications he had been taking at the time of the positive drug test, the interview continued as follows:

Q: Had you been around others that were using [marijuana]?

A: Probably so.

Q: What do you mean probably so?

A: 'Cause I have family members that, you know, . . . used then, but it's not like I was around them all the time, you know, I would . . . come by and hang out and play dominoes. . . . It's not like I was there every single day around 'em.

Q: And . . . when did this drug test occur?

A: Oh, I would say . . . 2002 time frame.

*Id.* at 77-78.

### *Financial Irresponsibility*

In the course of the background investigation conducted on the individual to determine his eligibility for access authorization, the LSO was provided with the individual's credit report, which indicated that the individual had outstanding balances with several creditors. On his QNSP, the individual listed only one debt on which he was more than 90 days delinquent. Exhibit 5 at 37. At the June PSI, the individual conceded that his credit report listed several creditors, but stated that he did not know which ones were in fact his responsibility, because he did not recognize the names of many of the creditors and because some of those listed may be the responsibility of his ex-wife pursuant to their divorce decree. June PSI at 12, 21. He explained to the interviewer that he listed on the QNSP only the creditor from whom he had been receiving inquiries. *Id.* at 49. He committed to the interviewer that he would take responsibility for addressing the debts in his credit report. *Id.* at 64.

At his August PSI, some seven weeks later, the individual was questioned about his progress in resolving his matters. When asked what he had done since the June PSI, he responded that he had spoken with his ex-wife, but not with any of his creditors about setting up payment plans. August PSI at 28-30. He stated that he still intended to resolve all his debts as soon as possible. *Id.* at 32-33. He also stated that he never intended to be dishonest, but that it never occurred to him to obtain a credit report in order to produce accurate information about his finances. *Id.* at 35. At the hearing, the individual testified that had in fact taken some steps to resolve his financial problems: "I went through [the report] . . . and was trying to get phone numbers and I'd looked on the Internet to try to find the people that I needed to contact. I just hadn't made contact with the people yet." Tr. at 54. He admitted that the interim between the two PSIs was a sufficient period in which to make contact with his debtors. *Id.* at 56. He stated that he did not perceive that the interviewer wanted him to address his debts urgently at the June PSI, but understood it clearly at the August PSI. *Id.* at 57.

At the hearing, three months after the August PSI, the individual was "still trying to hash some of this stuff out." Tr. at 10. He produced three letters he had written to creditors, in which he asked for explanations of the debts he allegedly owed to each one. Exhibits A-C. He testified that he had taken no other action to resolve any of the 13 debts listed in the Notification Letter. Tr. at 68. He testified that he had made "efforts to try to make contact with some of these, people, and I will try to make contact with more . . . of them to try to get it settled. If, in fact, that I do owe these people, I have no problem with paying[.] . . . So . . . if it's proven that they are mine, then I can – I'll pay them, that's not an issue." Tr. at 26-27.

### **V. Hearing Officer Evaluation of Evidence**

The LSO raises two concerns under Criterion F: that the individual failed to list all of his delinquent debts on his QNSP, and that he misrepresented his association with individuals who use marijuana in his contradictory responses at the June PSI. My impression of the individual was that he is extremely uninformed in financial matters. He testified that he had never seen a

copy of his credit report before he filed his QNSP. *Id.* at 10. He stated that it had never occurred to him to obtain his credit report in order to provide an accurate accounting of his debts. August PSI at 35. Instead, he simply listed the only debt of which he was aware: the creditor that had been mailing inquiries to him. Criterion F, and the associated Guideline E of the Adjudicative Guidelines, require that an omission of relevant information be accompanied by a willfulness or deliberation that I find lacking in this individual. *See* Adjudicative Guidelines at ¶ 16(a). His demonstrated lack of intent to mislead the LSO in its deliberation of his eligibility for access authorization in this instance mitigates the LSO's concern in this instance.

For entirely different reasons, I find that the individual's conflicting responses at the June PSI concerning his association with users of marijuana do not support a legitimate security concern under Criterion F. The individual was first asked whether he "currently" associated with illegal drug users. This question clearly sought information about his associations as of June 2008, and he responded in the negative. Later in the PSI, he was asked whether he had been associating with marijuana users at the time of his 2002 positive drug test, and he responded in the affirmative. These questions sought information about two discrete time periods. His responses to these questions need not have been identical in order for both answers to be true and complete. Logically, they form no support for concluding that the individual must have falsified his answer to one of the questions, let alone whether he deliberately falsified information with these responses. His positive response to the second question does not raise a concern under this criterion; it will be addressed properly under Criterion L.

The Criterion K concerns raised by the LSO are that the individual tested positive for illegal drugs on a random urinalysis screen in 2002 and that he possessed marijuana, at least in a technical sense, on several occasions, when he passed marijuana joints in a social setting. The individual has strenuously argued that the 2002 test must have been inaccurate because he has not used any illegal drugs since high school. He has presented corroborating evidence that he does not use illegal drugs. Tr. at 85 (testimony of live-in girlfriend), 104-05 (testimony of mother, with whom he lived from approximately 2003 to 2008), 91 (testimony of fellow unit member).<sup>5</sup> Although such testimony supports the individual's general respect for anti-drug laws, it does not establish that the positive test in 2002 must have been incorrect, particularly when balanced against the individual's response to learning about the positive test, which was to refuse to allow the employer to retest the sample but rather accept termination from employment. Whether his response was a matter of calculation, or merely misinformation or poor judgment, I cannot find that the individual has mitigated this concern.

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<sup>5</sup> I left the record in this proceeding open for two weeks following the hearing, until December 1, 2008, in order to permit the individual to submit additional supporting material. E-mail and letter to parties dated November 17, 2008, and November 18, 2008, respectively. Five weeks after the December 1, 2008, deadline, I notified the parties by e-mail that I would no longer accept any post-hearing submissions due to the passage of time. E-mail to parties dated January 8, 2009. Notwithstanding that notification, DOE Counsel filed a submission on behalf of the individual later that same day. This submission will not be accepted into the record.

The individual admits that he passed marijuana joints from person to person in social settings at his uncle's house. Although he denies that he has ever smoked marijuana in these circumstances, his possession of marijuana, if momentary, clearly raises a concern. The individual has stated that he no longer frequents his uncle's house. He stopped attending family gatherings there before he moved to the distant city in which he now resides and, since his move, has been to his uncle's city infrequently and spends little time with his family. At the hearing, he stated that he now understands the security concern associated with possessing marijuana, even in this very technical sense, and is committed to avoiding it in the future. *Id.* at 53. In light of his new-found comprehension of this security concern and his commitment, I find that the risk that the individual will possess marijuana in the future is very low. Nevertheless, for the reasons set forth below regarding Criterion L, I am not convinced that the individual will use sound judgment to comply with other laws, rules, or regulations, including those that concern the safeguarding of classified information.

The LSO invoked Criterion L with regard to both the individual's financial irresponsibility and his drug involvement. The LSO interviewer first confronted the individual with a copy of his credit report at the June PSI. The individual disputed the accuracy of the report, stating that he did not recognize many of the creditors listed on the report, and committing to addressing this concern of the LSO. Seven weeks later, at the August PSI, the LSO interviewer was clearly dissatisfied with the individual's lack of progress resolving his debts, and the individual himself admitted that he should have contacted his creditors by the time of the second PSI. Even if I accept the individual's viewpoint that the LSO interviewer did not impress upon him the urgency and importance of addressing his financial problems at the June PSI, he admits that her position was clearly stated at the August PSI. Yet three months later, at the hearing, the individual had still taken few steps toward correcting any errors on the report, and no steps toward repaying any of his creditors. His lack of sufficient attention to his financial matters places him at risk for coercion, exploitation or duress for as long as he carries these substantial debts. It also fails to mitigate additional concerns under Criterion L and Guideline E that he has exercised questionable judgment in handling his affairs and may be unwilling or unable to comply with rules and regulations.

The individual has admitted that he has, at least in the past, associated with illegal drug users, in that he spent time with some of his relatives at his uncle's house while they were smoking marijuana. He has addressed this concern to some degree by testifying at the hearing that he rarely sees these relatives now that he has moved to a distant city, and that he would in the future tell his relatives not to use marijuana in his presence. *Tr.* at 72. Although I found that similar testimony was sufficient to mitigate the LSO's Criterion K concern regarding the individual's possession of marijuana, I cannot reach the same conclusion under Criterion L. Criterion L focuses on a person's reliability, among other character traits. The individual used poor judgment when he associated with others, even though relatives, who used marijuana in social settings at which he was present. The fact that the individual has been in military law enforcement for 20 years and nevertheless did not recognize the impropriety of his behavior exacerbates my concern. Even if I accept that he is unlikely to associate with marijuana users in



the future, I am not convinced that he will employ good judgment as other new challenges arise, including those related to the safeguarding of classified information. Each factual basis for every concern in this proceeding involves an underlying judgment call that is questionable at best: not being willing to pay for a drug retest when the alternative is loss of employment; not actively resolving any disputes with creditors, especially after being put on notice that your employer considers the resolution urgent; possessing marijuana, even merely technically, as well as associating with marijuana users, when you have a background in law enforcement. The questionable judgment the individual has relied on in making past decisions raises serious doubts about his reliability in the future. I am simply not convinced that the DOE can rely on the individual's ability to make sound judgment calls regarding the safeguarding of classified information. I therefore find that the individual has not sufficiently mitigated the LSO's concerns under Criterion L.

## **VI. Conclusion**

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria F, K, and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has brought forth evidence to sufficiently mitigate the security concerns raised under Criterion F. I have also determined, however, that the individual has not sufficiently mitigated the LSO's security concerns under Criteria K and L. I therefore cannot find that granting the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

William M. Schwartz  
Hearing Officer  
Office of Hearings and Appeals

Date: January 12, 2009